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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1335

THOMAS S. KLEPPE, Secretary of the Interior of the United States of America, THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL., *Appellants-Cross-Appellees,*

VERSUS

WANDA JUNE WEEKS, ET AL., *Appellees-Cross-Appellants,*

and

THOMAS S. KLEPPE, ET AL., Secretary of the Interior of the United States of America, *Appellants-Cross-Appellees,*

VERSUS

DOROTHY FRAZIER and RUTH RATTLER, ET AL., *Appellees-Cross-Appellants,*

and

THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA BUSINESS COMMITTEE, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware Class, *Intervenors-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

APPELLEES' MOTION TO DISMISS APPEAL

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

APPELLEES' MOTION TO DISMISS APPEAL

The Appellees, Wanda June Weeks, Dorothy Frazier, and Ruth Rattler, individually and as members of the Kansas Delaware class, move the Court to dismiss the appeal

filed herein by the Appellants, the members of the Absentee Delaware class, for the reasons that the questions presented in the Jurisdictional Statement filed herein either are not presented by this case or are manifestly so unsubtantial as not to need further argument.[1]

By the Jurisdictional Statement in this Appeal, this Court is asked by the Appellants to issue an advisory opinion and to decide abstract questions of law in many of the Questions Presented. In essence, Questions Presented Nos. 1 and 6 invite only an academic discussion of the holding of the District Court.

If this Court elects to assume jurisdiction to decide Questions Presented Nos. 1, 2, 3, 5, 6, 7, 8(a), 8(b) and 10, it will be dealing only with abstract questions since the District Court did not decide the matter for which review is sought in the manner which is a predicate for the presentation of the questions. Further, the discussion of such questions in the Jurisdictional Statement misinterprets and misrepresents the holding of the District Court. Question Presented No. 4 asks this Court to review a question not contested in the District Court. Question Presented No. 11 presents an issue not decided contrary to the position of the Appellants.

It may fairly be said that the only Question Presented which is on an issue which was actually decided by the

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[1]This motion attacks the Absentee Delaware Jurisdictional Statement largely on the basis that the "Questions" set forth in that statement are simply not presented in this case, but rather are a product of gross and palpable distortion of the reasoning, and indeed, the express language employed by the District Court in its opinion and judgment. For these reasons, the Jurisdictional Statement in this case and this Motion should be read closely in conjunction with the opinion of the District Court.

District Court or was inherent in its judgment is No. 9. Such question involves both a question of fact and of law, but presents no substantial questions of constitutional standards to be applied or other novel question of sufficient importance to cause this Court to accept jurisdiction.

The questions presented in the Jurisdictional Statement filed by the Absentee Delaware Appellants are responded to separately as follows:

QUESTION NO. 1

"WHETHER, IN THE CIRCUMSTANCES OF THIS CASE, THE HOLDING OF *LONE WOLF* v. *HITCHCOCK*, 187 U.S. 553, 565-568, HAS AS THE DISTRICT COURT IMPLIED, BEEN OVERRULED, *SUB SILENTO*, BY *BAKER* v. *CARR*, 369 U.S. 189 [*sic*], 210-211, 215?"

This question is not presented by this cause for the reason that the District Court did not imply that *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), was overruled, *sub silento*, by *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

The *Lone Wolf* case, *supra*, involved an action by members of the confederated tribes of the Kiowa, Comanche and Apache Indians against the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office. The Plaintiffs in *Lone Wolf* were not emancipated Indians, but were wards of the government. The action sought the abrogation of a treaty between the tribe and the United States on the ground of fraud and further sought to void allotments made pursuant to Congressional Acts to members of the tribe and the settling of white men on tribal land after cession of such

land by the treaty in question. The suit directly involved the administrative power of the United States over the *tribal* property and was brought by Indians who were *wards* of the government.

This Court held in such case that the judiciary cannot question or inquire into the motives which prompted the enactment of the legislation. This Court carefully based its judgment on "the relation of dependency they (the Indians) bore and continue to bear towards the government of the United States." The plenary authority over the *tribal relations of the Indians* was the basis upon which Congress acted and that "power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

The District Court in the case at bar, in distinguishing the *Lone Wolf* case, said:

> "The authority conferred upon the other branches for dealing with the Indian Tribes by treaty is involved indirectly in this case in the sense that the historical background for the Delaware awards in question include several treaties with the Tribe, as discussed earlier. *There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function.* Instead, these recent enactments deal with equitable distribution following a judicial award, and proper classifications for the distribution. There is the additional view that enactments dealing with Indians involve the relationship of a ward to his guardian, and there is an element of such a relationship touched on by § 1294. Baker v. Carr, 369 U.S. 186, 215; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 567. *However, the challenge to the classifications made here does not refer to the guardianship relation, nor to*

the discretionary exercise of the guardianship function by the Congress." Appendix, page 30.[2] (Emphasis added.)

It is obvious from the above that the District Court distinguished the *Lone Wolf* case from the case at bar and did not, as this question represents, hold that this Court, in *Baker* v. *Carr*, *supra*, overruled *Lone Wolf*, *supra*. No issues in this case are comparable to those in the *Lone Wolf* case, *supra*.

QUESTION NO. 2

"WHETHER THE DECISION OF THE DISTRICT COURT IS INCONSISTENT WITH *MORTON* v. *MANCARI*, 417 U.S. 535, 552-553 AND n. 24, REGARDING PERMISSIBLE DISTINCTIONS BETWEEN INDIVIDUALS WHO ARE, OR MAY BE, MEMBERS OF FEDERALLY RECOGNIZED INDIAN TRIBES AND OTHER INDIVIDUALS, WHO COULD BE RACIALLY CLASSIFIED AS 'INDIANS,' BUT WHO DO NOT MEET THE STATUTORY OR TRIBAL CRITERIA FOR MEMBERSHIP IN A FEDERALLY RECOGNIZED TRIBE?"

The suggestion that the decision of the District Court involved distinctions between individuals who are or who are not members of federally recognized Indian tribes is incorrect. The distribution Act found to be unconstitutional had no tribal affiliation requirements, but was a simple plan to distribute funds per capita to lineal descendants (without regard to tribal affiliation or dependency

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[2] Appendix citations are to the Appendix to the Jurisdictional Statement in Case No. 75-1335 in this Court. Three appeals are pending from the Judgment of the District Court (75-1301; 75-1328; and 75-1335). The Secretary of the Interior has filed a Notice of Appeal, but has not filed a Jurisdictional Statement.

status) of persons whose names appear on two defined rolls, leaving out the lineal descendants of persons whose names appeared on a roll filed with the Commissioner of Indian Affairs in 1867, and who were active participating members of the Delaware tribe at the time of the wrong for which the Indian Claims Commission judgment granted recompense.

Even the portion of the award that was to be distributed to persons whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary" (Absentee class members) included persons of less than 1/8th Indian blood and who were, therefore, not eligible to be members of the Absentee Delaware Tribe of Western Oklahoma, but were eligible to be on such roll.

There can be no question of inconsistency between the decision of the District Court and with *Morton* v. *Mancari*, 417 U.S. 535, 92 S.Ct. 2474, 41 L.Ed.2d 290 (1974), since the awards in issue were not distributable to "federally recognized tribes" or to members thereof and no such distinction was in any manner involved.

QUESTION NO. 3

"WHETHER THE DISTRICT COURT ERRED IN LIMITING TO ITS PARTICULAR FACTS THIS COURT'S AFFIRMANCE OF *SIMMONS* v. *EAGLE SEELATSEE*, 384 U.S. 209, *aff'g* 224 F.Supp. 808 (E.D. Wash. 1965), AND REFUSING TO APPLY THE PRINCIPLE OF *SIMMONS* IN THE PRESENT CASE?"

The principle of *Simmons* v. *Eagle See'atsee*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966), *aff'g* 224 F.Supp. 808 (E.D. Wash. 1965), referred to in this question, is not stated, but, in the argument on page 33 of the Jurisdictional Statement, reference is made to the fact that the *Simmons* case, *supra*, held that Congress has plenary power to regulate and define tribal membership.

Nothing in this case is contrary to that principle. As noted above, membership in an Indian tribe is not involved except as the matter relates to the lineal descendants of members of the Delaware Tribe in 1854.

The District Court could not have erred in "refusing to apply the principle of *Simmons* in the present case" where no intra-tribal matters or tribal membership matters were involved.

This question is not presented under the issues of this case and the facts before the Court, and it, therefore, presents no substantial issue to be considered by this Court.

QUESTION NO. 4

"WHETHER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(1)(B) AND 23(b)(2) WERE IMPROPERLY EMPLOYED BY THE DISTRICT COURT TO AVOID DISMISSING THIS ACTION, AND, IF SO, WHETHER THE ADMITTED IMMUNITY OF THE TRIBAL BUSINESS COMMITTEE FROM SUIT AND ITS STATUS AS AN INDISPENSABLE PARTY WAS DISREGARDED THROUGH A USE OF CLASS ACTION PROCEDURE WHICH CONTRAVENES THIS COURT'S HOLDING IN *UNITED STATES* v. *UNITED STATES FIDELITY AND GUARANTY COMPANY*, 309 U.S. 506, 512-513?"

In the *Weeks* case, no suit was brought against any Indian tribal entity. Persons who were representatives of the defendant classes were individually sued, and the District Court found that they were representative of the lineal descendant classes whose rights would be affected by the judgment. Declaratory relief was the only relief sought as against such persons and the classes they represent. No relief was granted against any tribal entity (Appendix, page 27).

In the *Frazier* case, the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma were permitted to intervene, but no relief was sought nor granted against such tribal entities. The District Court did not, as stated by the Appellants, enter a declaratory judgment against "individual members of the Tribe as 'Representatives' of the Tribe and tribal business committee." The defendant representatives of the two classes of lineal descendants were sued as representatives of such classes, not as representatives of any tribal entities.

This action is a classic one for the utilization of the class action device. The defendant parties in each class,

being present lineal descendants of persons on two defined rolls, number approximately 9,573 (Appendix, page 43, note 36), a class so numerous that joinder of all members was impracticable; the questions of law and fact were common to all members of the class, the defenses of the representative parties were typical of the defenses of the class and the representatives would fairly and adequately protect the interests of the class. Rule 23(a), Fed. Rules of Civil Procedure. The requirements of Rule 23(b)(2) were likewise met. The defendant classes are clearly defined.

It is not stated by the Appellants how it is asserted that the class action device was "improperly employed," nor on what basis it is contended that the business committees were indispensable parties. Such contentions were never made in the District Court and no objections to the case proceeding as a class action were ever made known to the District Court (Appendix, page 10, note 4).

The Appellants cite the case of *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940), and state that the use of the class action device contravenes this Court's holding. That case did not involve the utilization of the class action device and no issues decided in that case touch on the question presented, except as that case reaffirms the time-honored principle that the United States and the Indian Nations in *tutelage* are immune from suit. No contrary contention is made in this action.

That this action involves no tribal properties or issues relating to the administration of Indian affairs in such a manner as to cause this action to be considered nonjus-

ticiable has been demonstrated above. Question No. 4 offers no additional or different issue.

Question No. 4 tenders no substantial issue for determination by this Court.

QUESTION NO. 5

"WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT CONGRESS WAS FORBIDDEN BY THE CONSTITUTION FROM RELYING UPON THE HOLDING OF THE COURT OF CLAIMS THAT 'THE INDIAN CLAIMS COMMISSION ACT REQUIRES THAT AWARDS BE MADE, NOT TO INDIVIDUAL DESCENDANTS OF TRIBAL MEMBERS AT THE TIME OF THE TAKING, BUT TO THE TRIBAL ENTITY OR ENTITIES TODAY?' *MINNESOTA CHIPPEWA TRIBE* v. *UNITED STATES*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971)."

The District Court held that Congress is "forbidden" from enacting a distribution statute that is invidiously discriminatory against a class of Indians by adopting classifications which were arbitrary and reflected no policy which bore a rational relation to the legitimate legislative goal of compensating present representatives of Indians wronged through a breach of a treaty.

The quote set out within this question from the *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 315 F.2d 906 (1971), is taken out of context and does not have the limited meaning ascribed to it when considered in the context of the case. The Court of Claims distinguished the *Minnesota Chippewa* case, *supra*, from the case of *McGhee* v. *United States*, 122 Ct.Cl. 380, *cert. den.* 344 U.S. 856, on the ground that in the *McGhee* case, there were members

of the Creek Nation who were not organized and who would not benefit at all from an award to the organized Oklahoma Creeks (page 271 and note 12). This distinction applies equally to the case at bar, and, thus, the *Minnesota Chippewa* case, *supra*, by its own terms, does not apply to a situation where as here, present representatives of members of the tribe at the time of the wrong are not members of a federally recognized tribe, but they are entitled to share in the award.

The Court of Claims, in cases after the *Minnesota Chippewa* case, *supra*, cautioned against a construction of that holding as contended for by the Appellants herein. These cases are discussed at length in the opinion of the District Court at pages 45 through 48 of the Appendix.

The predicate for Question No. 5, *viz.*, that the District Court held that the Constitution forbade Congress from relying upon the holding of the Court of Claims in the *Minnesota Chippewa* case, *supra*, being absent, the question is not presented for this Court's determination.

QUESTION NO. 6

"WHETHER AN ACT OF CONGRESS, DISTRIBUTING JUDGMENT FUNDS AND INVOLVING A NONCONTRACTUAL, NONVESTED CLAIM ON THE PUBLIC TREASURY, MUST MEET THE RIGOROUS STANDARDS OF JUDICIAL REVIEW APPLICABLE TO STATUTES INVOLVING CRIMINAL PROCEDURE, PARENTAL CUSTODY PROCEEDINGS, MARITAL AND FAMILY RELATIONS, AND OTHER BASIC LIBERTIES OF THE INDIVIDUAL, OR WHETHER THE MORE FLEXIBLE STANDARD OF REVIEW EMPLOYED IN AREAS OF ECONOMIC AND SOCIAL BENEFIT LEGISLATION IS APPLICABLE TO SUCH AN ACT OF CONGRESS?"

The District Court did not hold that the distribution act here involved had to meet the rigorous standards of judicial review referred to in this question. In fact, the District Court specifically declined to apply the rigorous "suspect classification" test:

> "Since no suspect classification or fundamental interest is involved, our inquiry is whether the classification excluding the Kansas Delawares is rationally related to a legitimate government interest, or whether it invalidly excludes a group standing on equal footing with others benefited. Jimenez v. Weinberger, 417 U.S. 628, 636-37; see also Weinberger v. Salfi, ... U.S. ....., ... (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84; McDonald v. Board of Education, 394 U.S. 802, 809." App. at 33.

The District Court noted that the claim is that of the injured ancestral tribe and present-day groups were before the Commission only on behalf of the ancestral entity (Appendix, page 53). The District Court then held:

> "In view of the redress which was the goal of the statute and the award, and in view of the Kansas Delawares' standing being equal in the context of that goal to that of the Absentee and Cherokee Delaware groups benefited, Jimenez v. Weinberger, 417 U.S. 628, 637; United States Department of Agriculture v. Moreno, 413 U.S. 528, 537, we cannot sustain the unequal classification and the arbitrary exclusion it makes. Against the history, the statutes and the treaties involved, the designation of the two 'modern groups' for exclusive distribution of the award is a discrimination reflecting no policy, but simply arbitrary and capricious action. Baker v. Carr, *supra*, 369 U.S. at 226." (Appendix, page 54.)

Whether the standards referred to in Question No. 6 are more or less rigorous than those applied in this case is not an issue for determination. The standard applied is that which has historically been applied in Equal Protection cases. *Jimenez* v. *Weinberger*, 417 U.S. 628, 94 S.C. 2496, 41 L.Ed.2d 363; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 542, 93 S.Ct. 2821, 2829, 37 L.Ed.2d 782 (1973); *Reed* v. *Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971).

The distinction (employed by Congress) between the classes of members of the historical tribe had no fair and substantial relation to the object of the legislation, *viz.*, to redress for the historical wrong, and all persons similarly circumstanced were not treated alike. Such classifications offend the principles of Equal Protection. *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *United States Department of Agriculture* v. *Moreno, supra; Reed* v. *Reed, supra;* and *F. S. Royster Guano Co.* v. *Com-*

monwealth of Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920).

Question No. 6 presents no issue for determination by this Court.

QUESTION NO. 7

"WHETHER THE HOLDING OF THE DISTRICT COURT, WHICH, AS APPLIED, REQUIRES THAT STATUTES DISTRIBUTING JUDGMENT FUNDS BE DRAFTED SO AS TO PERMIT AN INDIVIDUALIZED HEARING OF, AND DETERMINATION UPON, THE CLAIM OF EVERY PERSON WHO ALLEGES ANCESTRY IN AN INDIAN TRIBE FROM THE 'TIME OF THE WRONG' IS INCONSISTENT WITH THIS COURT'S DECISION IN *WEINBERGER* v. *SALFI*, 422 U.S. 749, 776-785?"

The opinion and Judgment of the District Court are devoid of any language which expressly, or in practical effect, would require an individualized hearing of any Kansas Delaware judgment fund claimant. The assertion that the District Court holding has this effect is a transparently misleading attempt to "shoe horn" this case into the factual context of *Weinberger* v. *Salfi*, *supra*, and to create from the whole cloth a question not presented on this appeal.

As written, the Act required a tracing of lineal ancestry to two rolls by the members of the Cherokee Delaware class and the Absentee Delaware class. The result of the decision of the District Court is that the Kansas Delaware class will likewise be required to trace their ancestry directly to a definite roll, *viz.*, the roll of persons prepared pursuant to Article 9 of the Treaty with the Delawares of July 4, 1866, 14 Stat. 793.

Since the Absentees could trace their ancestry to persons on "or eligible to be on" the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, individual hearings would be necessary in *their* case if their ancestors were not on but were eligible to be on such roll. No eligibility criteria are provided by the Act or by the history of the compilation of such roll (Appendix, page 42, note 35). No such complication will be added by inclusion of the Kansas Delawares since (unlike the criteria for the Absentee Delaware class) the names of the ancestors through whom the Kansas Delawares may claim is *known* and *definite* (Appendix, page 43).

In their arguments in support of this question and the preceding question, the Appellants assert that "ethnological evidence" will be necessary for the Kansas Delawares to prove their entitlement for inclusion (Appendix, pages 25, 26, 29).

There are no *ethnological* considerations involved. This is a case of pure and simple lineal descendancy to named persons on definite recorded rolls.

The case of *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), relied upon by the Appellants as authority for their Question No. 7, involved the question of whether a duration of relationship provision in the Social Security Act, inserted to prevent fraud, was valid. The individualized hearings which would result from this absence of a duration of relationship provision afforded the legitimate rationale for the inclusion of a test which had the effect of excluding some who could not qualify for benefits but who were not guilty of fraud. The case is not

in point. Further, as the District Court noted, the avoidance of fraud or sham claims was not the reason for the exclusion of the Kansas Delawares (Appendix 43).

There being no requirement as a result of the holding of the District Court that individualized hearings will be required for Kansas Delaware claimants, there can be no inconsistency with this Court's decision in *Weinberger* v. *Salfi, supra*. Question No. 7, therefore, presents no issue for this Court's determination.

QUESTION NO. 8

"(a) WHETHER THE DISTRICT COURT ERRED IN ADOPTING AS A STANDARD FOR CONSTITUTIONAL REVIEW OF INDIAN CLAIMS JUDGMENT STATUTES A THEORY OF 'BUT FOR' CAUSATION, INSEPARABLY LINKING THE JUDGMENT STATUTES TO THE THEORETICAL CIRCUMSTANCES WHICH COULD HAVE, BUT DID NOT, EXIST, AT THE 'TIME OF THE WRONG' WITHOUT REGARD FOR ANY INTERVENING CIRCUMSTANCES OR EVENTS, *e.g.*, BY HOLDING THAT IF A SUM CERTAIN HAD BEEN PAID TO THE DELAWARE TRIBE IN 1854, THE CONSTITUTION REQUIRES A CONCLUSIVE PRESUMPTION THAT THIS SAME SUM WOULD HAVE BEEN A PART OF THE TRIBE'S ASSETS DECADES LATER?"

The District Court did not hold that "if a sum certain had been paid to the Delaware Tribe in 1854, the Constitution requires a conclusive presumption that this same sum would have been a part of the tribe's assets decades later."

This is a reference to the fact that the funds represented by the award by the Indian Claims Commission would have, had there been no breach of the Treaty of 1854, been placed in the Delaware National Trust Fund in 1857.

Such fund was to be used for the benefit of the Delaware people and, in 1866, a treaty was entered into under which the ancestors of the Kansas Delawares received a pro-rata part of that fund, as diminished by the treaty breach. The District Court very reasonably noted that had the treaty breach not occurred, the Kansas Delaware ancestors would have received their share of the fund as increased (Appendix, pages 49, 53, 54).

By this question, the Appellants urge that such fund might have been spent between 1857 and 1866. Of course, it might have been had it been available at such time. But, it would have been spent for the welfare of the Delaware people, of which the Kansas Delawares' ancestors were a part, and they would have received the benefit of such use of the funds. The question is frivolous and of no substance.

"(b) PARTICULARLY, WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE TREATY OF JULY 4, 1866, 14 STAT 793, 796, BY WHICH THE ANCESTORS OF THE PRESENT 'KANSAS DELAWARE' CLAIMANTS RENOUNCED THEIR DELAWARE CITIZENSHIP AND RIGHT TO PARTICIPATE IN TRIBAL COUNCILS, AND ASSUMED UNITED STATES CITIZENSHIP AND OTHER BENEFITS UNAVAILABLE, AT THAT TIME, TO TRIBAL INDIANS, SEE *ELK* v. *WILKINS*, 112 U.S. 94, 103-106, WAS IRRELEVANT BECAUSE THE DUE PROCESS CLAUSE COMMANDS CONGRESS TO CONCLUSIVELY PRESUME 'BUT FOR' CAUSATION IN JUDGMENT STATUTES?"

This statement of facts omits to add that the present Kansas Delawares are descendants also of minor Delaware Indians who *did not* renounce their Delaware citizenship and right to share in the tribal assets. It omits to add that

the adult Kansas Delawares who did resign from the tribe did so on the *express condition* that they would receive their pro-rata share of the fund of which the Indian Claims Commission award represents a part. It omits to add that Congress, by an Act in 1875, restored to Indians any rights to tribal assets which they may have lost by a prior abandonment of their tribal relations. 18 Stat. 420, 43 U.S.C. §189.

The District Court found that there were no events after the time of the wrong which changed the rights of the members of the Delaware Tribe as it then existed to share in the award of the Indian Claims Commission to redress for that wrong (Appendix 49).

Elk v. *Wilkins*, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643, referred to in this Question, did not in any manner involve an issue which is in this case. That case involved only the question of whether an Indian abandoning his tribe and taking up residence with white persons became a citizen of the United States without naturalization or Congressional Act specifically conferring citizenship status.

This question tenders no issue for the Court's determination.

QUESTION NO. 9

"WHETHER, REGARDLESS OF THE STANDARD OF REVIEW EMPLOYED, THE TERMS OF 86 STAT. 762, 25 U.S.C. 1291-1297 ARE SO ARBITRARY AND CAPRICIOUS AS TO BE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?"

The purpose of the challenged statute being to compensate the present representatives of the members of the Delaware Tribe as it existed in 1854, the standard of review was whether such statute was reasonably calculated to accomplish such legislative purpose and whether a group on equal footing with the benefited groups was invalidly excluded due to a baseless distinction.

The District Court found that the status of the three classes of claimants to share in such fund was identical and that the exclusion of the Kansas Delaware class was apparently inadvertent (Appendix, pages 38, 39, 54). The testimony of the attorney who represented the claimants in the Indian Claims Commission, appearing before the Subcommittee on Indian Affairs in the House Committee on Interior and Insular Affairs, was that if the statute was approved in the form in which it was later enacted, *there would be no exclusion of descendants of members of the Delaware tribe as it existed in 1854.* The existence of the Kansas Delaware class was not known to the Indian representatives who appeared before the Congressional Subcommittees and the question was never considered by Congress (Appendix, note 29, page 38).

The proffered rationale to support the exclusion of rightful claimants to share in the award is now offered as a

rationale which *might have been* a reason for the exclusion if the matter *had been* considered by Congress. The District Court found such proffered rationale to be wholly lacking in substance and not supportive of the exclusion, resulting in the invidious discrimination.

Question No. 9 asks this Court to consider whether the exclusion of a class of claimants which stood on the same footing as the included class was arbitrary and capricious. The answer to this question, we submit, is so clearly established in the decisions of this Court that it presents no substantial question to be decided in this appeal.

The unequal treatment of classes with equal standing and the arbitrary exclusion of a class rests on no foundation rationally related to the legitimate governmental interest serving the purposes of the Act. (See cases cited by the District Court on page 54 of the Appendix.)

The Equal Protection component of the Due Process clause of the Fifth Amendment does not permit such invidious discrimination and since there was no rationale which reasonably supported the discrimination, there is no novel question presented for review by this Court.

The suggestion that the accepted standards should not apply to an action where rights of persons arise out of Indian history is clearly untenable. To accept such a proposition would be a form of racism and would deny to the citizens of Indian heritage an equal standing before the law. Such an approach to this case would be tantamount to stating that all emancipated, non-ward, wholly independent Indians are second-class citizens.

The reasoning supporting the Appellants seems to be that the Treaty of 1866 with the Delaware tribe granted each Delaware who elected to remain in Kansas in 1867 a pro-rata share of the fund as a condition to their resignation from the tribe; and that upon the acceptance by such Indians of the responsibilities as United States citizens, such persons would not thereafter have standing to claim their share of such fund because the Constitution grants exclusive powers to Congress to deal with Indian tribes. On the one hand, these citizens were granted the rights of all other United States citizens, but when they seek to enforce such rights, the Appellants would say they are precluded from doing so because the legislation which is challenged involves "Indian rights" and, thus, involves political questions beyond review by the Courts. Thus, the crux of the matter is that the Appellants would have this Court create a constitutionally blighted category of "has been" Indians that never were and are not citizens possessed of constitutional rights guaranteed to all.

It is respectfully submitted that the discrimination against the Kansas Delaware class is clearly shown to have been arbitrary and capricious, without a reasonable rationale and under the time-honored standards of equal protection, they have been denied rights secured to them, as they are secured to all citizens.

This question, we submit, does not tender a substantial question for review by this Court.

QUESTION NO. 10

"WHETHER THE DISTRICT COURT ERRED IN DISREGARDING THE CONGRESSIONAL POLICY OF DISTRIBUTING INDIAN CLAIMS JUDGMENT AWARDS ON A BASIS OTHER THAN ETHNOLOGICAL 'TRACING' OF 'BLOOD DESCENDANTS' FROM THE 'TIME OF THE WRONG' FOR WHICH THE AWARD WAS MADE, IN THE ABSENCE OF AN UNEQUIVOCAL SHOWING THAT THIS CONGRESSIONAL POLICY IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?"

This question presumes the existence of a Congressional policy not shown to exist either by the record in this case or demonstrated by citation of authorities in the Jurisdictional Statement.

In this specific instance, the Congress adopted an Act to distribute an Indian Claims Commission award to lineal descendants of persons on two specific rolls. In so doing, the Congress excluded a class of persons equally entitled to share in such award. By such exclusion, the Congress invidiously discriminated against the excluded class. Whatever general policy the Congress has adopted as to other Indian Claims Commission awards is irrelevant in the determination of whether the Equal Protection rights of the excluded Delaware Indians were violated.

The "tracing" referred to in this question is not "ethnological," but is one of lineal blood descendancy. No Congressional policy as to such matters has been demonstrated and the District Court was not made aware of any general policy which it could have considered as being or not being repugnant to the Due Process Clause of the Fifth Amendment.

In considering the Congressional Act in question, the inquiry was whether there was a classification which bore no rational relationship to the purposes of the distribution statute, to redress for a breach of a treaty.

This involved a consideration of the historical background and the purposes of the Indian Claims Commission Act to enable the Court to determine whether the classification was calculated to achieve the legislative purpose intended. In so doing, Congress inadvertently excluded the Kansas Delaware class which the District Court found stood on the same footing in relation to the award as the other classes. No general policy of Congress as to how present representatives of the parties who were wronged are to be determined in Indian Claims Commission matters is involved. However such determination is made, the Equal Protection component of the Fifth Amendment demands that all persons in equal standing be equally treated unless there is a rationale reasonably related to the Congressional purpose which justifies a classification which may result in unequal treatment. No such rationale was shown in this case.

Question No. 10 does not tender a substantial question for determination by this Court and does not present a question which can be reached in this case.

QUESTION NO. 11

"WHETHER THE DISTRICT COURT PROPERLY ENJOINED THE OPERATION OF AN ACT OF CONGRESS UPON THE COMPLAINT OF PARTIES ALLEGING A MONETARY TAKING, RATHER THAN DISMISSING THE COMPLAINT WITHOUT PREJUDICE TO AN ACTION IN THE COURT OF CLAIMS?"

The Absentee Delaware Appellants discuss the substantiality of this question at pages 34-35 of their Jurisdictional Statement. In that discussion, Appellants correctly point out that the "just compensation" issue was decided by the District Court in *Appellants' favor* and made consideration of Appellants' Tucker Act defense unnecessary. See Jurisdictional Statement, *supra*, and the District Court Opinion at Appendix 65. Thus, this two-pronged issue formed no part of the holding of the court below, formed no part of the basis for the judgment and, in any event, was decided favorably to the Appellants. This question can hardly be said, in this context, to be presented by this appeal.

CONCLUSION

The Appellants make several references to and rely upon the dissenting opinion of Judge Daugherty in the District Court (Appendix, pages 16, 28, 30, 31, 34). It is appropriate to observe that Judge Daugherty viewed this case as involving a matter of ". . . distribution of funds to the Indian Tribe and members on their rolls" (Appendix, page 82). As so viewed, the case might have involved the serious jurisdictional infirmities noted by Judge Daugherty. The cases cited and relied upon by Judge Daugherty were cases

in which the rights of *unemancipated Indians* were involved or the administration of *tribal properties* was an issue. The Appellants, on page 23 of their Jurisdictional Statement, and Judge Daugherty, in his dissenting opinion (Appendix, page 82), cite the case of *National Indian Youth Coun., Int. Ind. Sch. Chap* v. *Bruce*, 485 F.2d 97 (C.A. 10th, 1973). That was a suit against officials and employees of the BIA and an employee of the Public Health Service seeking the closing of a Navajo school on an Indian reservation and an attack on the practices and policies at such school. The action was dismissed on the ground that sovereign immunity precluded the action. The Court of Appeals affirmed on the ground that it was an unconsented suit and noted also that the Courts are without jurisdiction when confronted with nonjusticiable political questions, such as determining the *status of Indian tribes*; that Congress has exclusive plenary legislative authority over Indians and all of *their tribal relations;* and that the Court has recognized the plenary power of Congress to control and manage the affairs *of its Indian wards*. The Court further buttressed its affirmance of the dismissal by stating that credence should be particularly accorded those who are working with treaties; and that courts cannot substitute their judgment for that of those working with Indians, empowered to exercise discretion. None of these factors are involved in the case at bar.

The Kansas Delaware lineal descendants of the historical Delaware tribe are fully emancipated, have no reservation or tribal trust properties which are the subject of the legislation and their affairs are not administered by the government.

It is submitted that the reliance upon the *Lone Wolf* and *National Indian Youth Council* cases, *supra*, and others which have similarly held that the administrative control of Indian tribal properties, or the governing of unemancipated Indians involve nonjusticiable questions, is misplaced when applied to distribution of funds between non-ward Indians whose ancestors were members of a formerly existing but abandoned tribe and the funds were appropriated to pay judgments entered after judicial proceedings.

The Appellants, on page 30 of their Jurisdictional Statement, noted that Judge Daugherty had stated that there is an "abundance" of rationale supporting the challenged legislation. They then quote from the dissenting opinion (Appendix, page 89), italicizing for emphasis the statement of Judge Daugherty "that there were some people claiming Delaware ancestry" who would not be covered by the Act. This leaves the clear impression that Congress *intended* to exclude the Kansas Delawares. The clear fact is that the "some people" referred to were not the Kansas Delawares but were Munsee Indians whose ancestors were not with the tribe at the time of the wrongs (Appendix B, pages 36, 37, 39).

Judge Daugherty stated that there had been problems, turmoil, confusion and delay in the distribution of a prior award in which the Kansas Delawares shared and that the avoidance of such problems in the later statutes afforded a rationale to support the change (Appendix, page 86). The fact is that none of the problems, turmoil, confusion or delay in the past was in any way connected with or related to the Kansas Delawares, but resulted from claims by Munsee Indians (Appendix, page 40). Judge Daugherty

noted that the Kansas Delawares stayed in Kansas when the main body of the tribe joined the Cherokee Nation and noted further the other historical facts relating to that move without also noting that the Kansas Delawares did so on the *express condition* contained in the Treaty of 1866 that they would receive their pro-rata part of the very fund which the Indian Claims Commission found to have been diminished by the treaty breach and for which the award was entered. The case of *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202 (Ct.Cl. 1960), is cited as authority for the separation from the tribe as a supporting rationale without noting that in the *Miami* case, the separation occurred *prior* to the time of the wrong. The Kansas Delaware separation was *after* the wrong.

Judge Daugherty cites, as supporting rationale for the challenged statute, the historical differences in the status of the Delaware tribe at an earlier date from its status after the tribe was dissolved in 1867, stating that these differences provided rationale for the change from an earlier award in which the Kansas Delaware class shared to the later one where they were excluded. The changes in status occurred *after* the wrong in 1857. At the time of the two wrongs for which the awards were made, the status of the tribe and its members was exactly the same except that they were living in different states. Further, the legislative history shows that any such change, if there was any, was not the reason for the exclusion of the Kansas Delawares.

Judge Daugherty cites as a legal precedent for the challenged statute, the case of *United States* v. *Delaware Tribe of Indians*, 427 F.2d 1218 (Ct.Cl. 1970), which he says

provided for payment of an award entered for a transaction involving the Delaware "outlet" and states that "it was paid to the Oklahoma Delawares (Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma) to the exclusion of the so-called Kansas Delawares" (Appendix, page 88).

An appropriation to pay the award given in the above case has been made but no payment of such funds has been made to anyone. No plan of distribution for such payment has been submitted to Congress and, in fact, the Secretary of the Interior is withholding action on such plan awaiting the final determination of this case. Such case is no legal precedent to support the challenged legislation.

The "abundance" of rationale suggested by Judge Daugherty as supportive of the challenged discrimination melts upon careful scrutiny. The "powerful dissent," as the Appellants characterize the dissenting opinion (Appendix, page 31), insofar as it is based upon a finding of no jurisdiction in the matter, is lessened greatly in its import when it is considered in the light of the fact that Judge Daugherty treated the matter as if the Indians involved were unemancipated wards of the government, who are members of presently existing Indian tribes. This lack of comprehension of the true status of the parties and the nature of the funds to be distributed so colored the consideration of the other facets of the case that "rationale" was found which is either wholly illogical or contrary to the facts. Even the legal precedent relied upon is non-existent.

We submit that the dissent of Judge Daugherty should not lend weight to the argument that the questions pre-

sented are substantial when, on close analysis, it is evident that no substantial questions are suggested by the Appellants' Jurisdictional Statement.

We submit that the appeal of the Absentee Delawares should be dismissed for lack of presentation of substantial questions.

Respectfully submitted,

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April, 1976

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High & Patton, 323 Fidelity Plaza, Oklahoma City Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of Interior of the United States; Messrs. Watts, Looney, Nichols, Johnson & Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver, Tulsa, Oklahoma 74119, counsel of record for Cherokee Delaware class and named individual members thereof; Messrs. Joseph S. Fontana and John R. Keys, Winston & Strawn, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Cherokee Delaware class and named individual members thereof; Mr. George C. Christensen, Winston & Strawn, Suite 5000, One First National Plaza, Chicago, Illinois 60603, counsel of record for Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail, first class postage thereon fully prepaid; I further certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; and Mr. Duard

Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this ..... day of ....., 1976, in conformity with 80 Stat. 613, 28 U.S.C. §518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

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Delmer L. Stagner